BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 34305
	)	
EDWARD ALCORN	)	**BOARD DECISION**
	)	(Precedential)
	)	
From dismissal from the position of Correctional Officer at the California State Prison-Solano Department of Corrections at Vacaville	)	**NO. 95-03**
	)	
	)	February 7-8, 1995

Appearances: Mark Carroll, Hearing Representative, California Correctional Peace Officers Association on behalf of appellant, Edward Alcorn; John P. Winn, Attorney for the Department of Corrections, on behalf of the respondent, Department of Corrections.

Before: Richard Carpenter, President; Lorrie Ward, Vice President; Alice Stoner and Floss Bos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Edward P. Alcorn (appellant or Alcorn) from dismissal from the position of Correctional Officer with the Department of Corrections (Department). As cause for discipline, appellant was charged with failing to comply with the requirements of his previous settlement agreement, reporting to work while under the influence of alcohol, and lying during his interview with the Medical

Review Officer[1] and during his investigatory interview concerning the amount of alcohol he had consumed before coming to work.

After a hearing, the ALJ modified the dismissal to a 6 months' suspension on grounds that postdismissal termination rehabilitative efforts on the part of appellant qualified him for reinstatement. The Board rejected the ALJ's Proposed Decision and determined to decide the matter itself.

After a review of the entire record, including the transcript, the exhibits and the written and oral arguments of the parties, the Board sustains appellant's dismissal for the following reasons.

FACTUAL SUMMARY

For the most part, the facts are undisputed. Appellant has been employed as a Correctional Officer since June 16, 1986. In December 1992, the appellant was served with an adverse action in connection with three alcohol related incidents. The first two incidents were based on his arriving at work while under the influence of alcohol.

The third incident focused on appellant's involvement in a single car accident that occurred while he was on the way to

[1]California Code of Regulations, Title 2, section 599.965 establishes the requirement that an appointing agency designate a licensed physician as a medical review officer to receive and interpret the substance abuse test results and consider any explanations offered by the affected employee.

work, in full uniform, and under the influence of alcohol. The appellant was also charged, inter alia, with dishonesty in connection with his statements to his superiors and to the California Highway Patrol (CHP) concerning his consumption of alcoholic beverages. The case was settled prior to hearing. As part of the settlement, appellant received a 1 step reduction in salary for one year and agreed to attend, at his own expense, a substance abuse counseling program for one year and agreed to submit to random substance abuse testing for a period of one year at any time he was on the grounds of the California State Prison-Solano.

Appellant failed to comply with the provisions of the stipulation for settlement in his prior adverse action. Beginning in April of 1993, appellant failed to attend a substance abuse counseling program at least once per week and failed to provide written substantiation of his attendance to the Employee Relations Officer as required by the stipulated agreement.

On September 16, 1993, while under the influence of alcohol, appellant again drove to work at the California State Prison-Solano arriving at approximately 2315 hours. The Sergeant on duty noticed that the appellant had the odor of alcohol on his breath and that, as the appellant walked toward his worksite, he appeared to be unsteady on his feet and was "almost staggering."

The Sergeant notified the Watch Commander who talked to the appellant in the facility office. The Watch Commander observed that appellant's eyes were bloodshot and ordered him to take a substance abuse test. The results of the test revealed a positive reading for ethyl alcohol of .17 grams per deciliter, which is four times the cut-off level of .04 established by the National Institute on Drug Abuse.[2] Appellant was driven home by supervisory staff because he was unable to perform his assignment.

On October 4, 1993, the appellant told the Medical Review Officer (MRO) that he drank four to five beers and had taken Nyquil for congestion some ten hours before the test was taken. The MRO was of the opinion that the amount of alcohol appellant claimed to have consumed would not have resulted in a blood alcohol reading of .17 percent. During his investigatory interview on October 25, 1993, the appellant repeated the statements made to the MRO.

For the most part, appellant admits the charges against him. He concedes that he came to work intoxicated on September 16, 1993. He began drinking in the morning while looking through some personal possessions which reminded him of his failed marriage. He had four to five beers in a short period of time

[2]California Code of Regulations, Title 2, section 599.963 provides that drug tests of state employees are to be conducted according to standards set by the National Institute on Drug Abuse.

which made him feel much better. He then took two doses of Nyquil and went to bed in preparation for his first watch shift which began at about 11:00 p.m. He conceded that he drove to work while intoxicated and that he was in no condition to work that evening.

The only significant factual dispute concerns the discrepancy between appellant's original account of drinking four or five beers and two doses of Nyquil and the test results of appellant's blood alcohol level. Appellant testified that when he was interviewed by the MRO and the investigator, he could only remember having drunk the four to five beers and having taken two doses of Nyquil. After he was dismissed, however, and while he was moving his possessions out of his home, he discovered that an ornamental flask of tequila which he had owned for years had been opened and the contents were missing. At the hearing, appellant surmised that he opened the ornamental flask of tequila the evening of September 16, 1993 and drank the contents of it during an alcoholic blackout. Although he does not specifically remember drinking the tequila, he believes that the empty tequila flask accounts for his high blood alcohol reading on the evening in question.

At the hearing, appellant acknowledged that he is an alcoholic. He testified that he originally complied with the terms of his settlement agreement with the Department by going to

Alcoholics Anonymous (AA) meetings in Suisun City where he lived, but stopped attending because former inmates attended the meetings and made insulting and threatening statements to him when he attended. He did not seek out other AA meetings nor did he seek out any other form of substance abuse counseling.

Since his dismissal, appellant has found a new faith in God and has joined a church in Vacaville. He is engaged to a woman he met in September of 1993, Patricia Hynds, who testified at the hearing before the ALJ that appellant now demonstrates a commitment to sobriety. Ms. Hynds also accompanied appellant to his hearing before the Board.

Appellant claims to have regularly attended Alcoholics Anonymous meetings in Vacaville during the five months between his dismissal on December 10, 1993 and the hearing before an ALJ on May 10, 1994. He was, however, able to present evidence of his attendance at only five regular AA meetings in the three months before his hearing in May of this year. In addition, appellant claimed to have attended two AA meetings held in his home during March.

ISSUES

This case presents two primary issues for our determination:

(1) What weight should the Board give to postdismissal evidence of ongoing rehabilitation in evaluating the appropriate level of penalty for a peace officer; and,

(2) What is the appropriate level of penalty under all the circumstances?

DISCUSSION

The Charges

Appellant's conduct of reporting to work on September 16, 1993 while intoxicated constitutes inexcusable neglect of duty, drunkenness on duty, and a failure of good behavior during duty hours of such a nature that it causes discredit to the appointing authority pursuant to Government Code § 19572, subdivisions (d), (g) and (t). Driving a vehicle to work while in uniform and while intoxicated also constitutes a failure of good behavior outside of duty hours of such a nature that it causes discredit to the appointing authority pursuant to Government Code § 19572, subdivision (t). Richard J. Hildreth (1993) SPB Dec. 93-22 (nexus found between Correctional Officer's off-duty drunk driving incident and his employment).

Appellant's statement that he had consumed only four to five beers and two doses of Nyquil before coming to work did not, however, constitute dishonesty. A finding of dishonesty requires an intent to deceive. The ALJ who heard appellant's testimony believed appellant's account of drinking tequila from an ornamental flask while in a blackout. While credibility determinations by an ALJ are not conclusively binding on the Board (see Karen Johnson (1992) SPB Dec. 92-02, at 4), the Board

gives great weight to credibility determinations by the ALJ absent evidence in the record that contradicts such determinations. (Linda Mayberry (1994) SPB Dec. 94-25, at 6.). The Board accepts the ALJ's credibility determination that appellant did not know he was misreporting his alcohol consumption.

The Penalty

Having found the evidence supports the findings of fact and conclusions of law set forth above, the only question left for determination is the appropriate level of penalty. When performing its constitutional responsibility to review disciplinary actions (Cal. Const. Art. VII, section 3(a)), the Board is charged with rendering a decision which, in its judgment is "just and proper". (Government Code § 19582). In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.) The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

Likelihood of Recurrence/Postdismissal

Evidence of Rehabilitation

The ALJ who conducted the hearing found that appellant is a changed man who accepts his alcoholism and is committed to living a sober life. In accordance with this finding, the ALJ concluded that appellant is an excellent candidate for rehabilitation and recommended that appellant be given a second chance. We disagree: appellant has already had his second chance.

Although this is appellant's first dismissal, he was earlier subjected to discipline for alcohol related misconduct. The earlier adverse action resulted in a settlement agreement. As part of that settlement, appellant agreed to participate in substance abuse counseling and to substantiate his participation. He did neither. Nine months after the settlement was formalized,

appellant again exhibited the same behavior charged in the first adverse action -- appellant drove to work in full uniform while under the influence of alcohol.

Appellant had a clear opportunity to squarely address his alcohol problem, but failed to do so. Thus, appellant, by his conduct, has already demonstrated a high likelihood that the misconduct will recur.

Appellant's postdismissal rehabilitation efforts do not significantly change this analysis. As affirmed by the California Court of Appeal in Department of Parks & Recreation v. State Personnel Board (Duarte) (1991) 233 Cal.App.3d 813, in evaluating the penalty assessed by the Department, the Board may properly consider evidence of rehabilitation which occurred after the date of dismissal. (Id. at 828; See also Karen Nadine Sauls (1992) SPB Dec. 92-13.) Evidence of postdismissal rehabilitation is relevant to a determination of whether recurrence of the charged misconduct is likely. (Duarte, 233 Cal. App 3d at 828.)

In Duarte, the court explained that the Board may not modify a dismissal based solely upon postdismissal evidence of rehabilitation. (Id. at 829.) The Board may, however, "consider [postdismissal] evidence along with all the other circumstances of the case." (Id.)

In other words, evidence of postdismissal rehabilitation may be considered as part of the assessment of the likelihood of

recurrence of charged misconduct, but it is not the only evidence of whether such misconduct is likely to recur. Even assuming postdismissal evidence of rehabilitation indicates that recurrence of misconduct may be less likely, the likelihood of recurrence factor must be weighed with the other Skelly factors in determining the appropriate penalty.

Appellant argues before the Board that the dismissal focused his attention on the role alcohol played in his life. He claims that the likelihood of recurrence is small because of his commitment to sober living demonstrated by his admission that he is an alcoholic and his involvement in AA meetings. Yet, at the hearing before the ALJ, he substantiated his attendance at only five regular AA meetings in the five months between his dismissal on December 10, 1993 and his hearing on May 11, 1994. Thus, evidence of appellant's postdismissal rehabilitation only marginally shifts the likelihood of recurrence factor in his favor.

Appellant cites Karen Nadine Sauls (1992) SPB Dec. No. 92-13 in support of his argument that appellant's postdismissal rehabilitation efforts compel his reinstatement. In Sauls, an office assistant who became addicted to methamphetamines while dieting was dismissed by her employer for excessive absenteeism. While the Board conditionally modified Sauls' dismissal to a lengthy suspension based on fairly limited evidence of

rehabilitation, the Board did so only after noting that the harm suffered by the department, while cognizable, was not of such a nature as to counsel against consideration of mitigating circumstances. The quality of Sauls' work was satisfactory, her work history was good, and the department was unaware she had a substance abuse problem until she admitted it. Most significantly, Sauls was an office assistant, not a peace officer working in a prison environment. Even if Sauls' misconduct recurred, the actual harm to the public that could result from further absenteeism cannot compare to the harm that could come of a correctional officer being under the influence at work.

As noted above, the likelihood of recurrence is but one factor in the Board's evaluation of the penalty assessed by a department. We now turn to the other Skelly factors we must consider; the circumstances surrounding the misconduct and harm to the public.

Circumstances Surrounding Misconduct

In William Aceves Jr. (1992) SPB Dec. No. 92-04, the Board set out a number of circumstances which may affect the issue of penalty in a case involving alcoholism including the nature of the work, the employee's length of service, on the job performance and history of prior disciplinary actions. In analyzing how the issue of alcoholism should impact penalty, the Board found that under some circumstances, alcoholism could be

considered a mitigating factor when the misconduct charged was attributable to alcoholism.

The Board noted that Aceves was a long term employee (fourteen years) with an excellent work history and no prior adverse actions. His position as a computer operator was not one that carried a risk to his own safety or the safety of others. Aceves' misconduct consisted primarily of attendance problems which were directly related to his alcoholism. Despite knowledge of Aceves' alcoholism, the department failed to refer Aceves to an Employee Assistance Program or warn him of the consequences of failing to seek treatment. The Board found that the circumstances surrounding Aceves' misconduct weighed in his favor against dismissal.

In the present case, appellant held his position for six and one half years. By all accounts, he was a good worker. The instant adverse action is not, however, his first adverse action. He was disciplined for similar, alcohol related conduct a year earlier, although the adverse action was resolved through settlement. The parties do not dispute that appellant's misconduct was attributable to his alcoholism. Unlike employers in Aceves and Sauls (see discussion infra, at pp. 12-13) who did not or could not address their employees' alcoholism, the Department of Corrections referred appellant to counseling. In

fact, the Department made counseling a condition of the agreement settling the prior adverse action.

Thus, even though alcoholism may be considered a mitigating factor in evaluating employee discipline, the circumstances surrounding appellant's misconduct do not weigh in favor of leniency.

Harm to the Public

The Board clarified the weight to be given to the Skelly factors in Gordon J. Owens (1992) SPB Dec. No. 92-11, noting that "the harm to the public remains [the Board's] 'overriding concern'." (Id. at 8-9.) In Aceves, we found that the harm to the public was fairly minimal. Aceves was a Senior Computer Operator. The harm resulting from his attendance problems consisted of little more than computer processing delays. Similarly, Sauls involved an employee who worked in a safe environment and whose misconduct consisted solely of excessive absenteeism. In both cases, the Board found that, considering the circumstances surrounding the misconduct and the fact that recurrence was unlikely,[3] the harm to the public was not severe enough to support the penalty of dismissal. (Aceves, pp. 16-17; Sauls, pp. 5-10). In contrast, in the case before the Board,

[3]In Sauls, the Board relied in part on Sauls' willingness to provide documentation of ongoing rehabilitative efforts and to undergo voluntary random drug-testing as a means of assuring the department of the unlikelihood of recurrence. (Sauls, p. 10)

appellant reported to work under the influence of alcohol. Appellant is not a computer operator or an office worker; he is a correctional officer and peace officer. The harm, or potential for harm, to the public is much greater for a correctional officer than for many other state employees. Prisons are dangerous places where the capacity to remain alert may mean the difference between life and death. If undetected, an employee who reports to work under the influence of alcohol creates a danger to himself, to other officers and to inmates in his care.

In addition, appellant's conduct of driving his vehicle to work while intoxicated is a criminal act. A peace officer who breaks the law he is sworn to uphold discredits himself and his employer. (Ramirez v. State Personnel Board (1988) 204 Cal.App.3d 288, 293). While state employees may not be held accountable for off-duty misconduct that bears no relationship to state employment, peace officers are held to a higher standard of conduct than other employees. (Compare Charles Martinez (1992) SPB Dec. No. 92-09 to Leslie Wolford (1993) SPB Dec. No. 93-17 at 6-7 and Richard J. Hildreth (1993) SPB Dec. No. 93-22.) Thus, the harm to the public is significant when a peace officer disobeys the law by driving under the influence of alcohol. We find that dismissal is appropriate based on a weighing of all the Skelly factors including the harm to the public, the

circumstances surrounding appellant's misconduct and the likelihood that the misconduct will reoccur.

CONCLUSION

Appellant's conduct of reporting to work on September 16, 1993, while intoxicated, constitutes inexcusable neglect of duty, drunkenness on duty, and a failure of good behavior pursuant to Government Code § 19572, subdivisions (d), (g) and (t). Driving while intoxicated constitutes a failure of good behavior pursuant to Government Code § 19572, subdivision (t). The charge of dishonesty was not proven. Considering the risk of harm appellant's misconduct brings to the public, the circumstances surrounding appellant's misconduct and the likelihood of recurrence, we find dismissal appropriate.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced action of the Department in dismissing appellant Edward P. Alcorn from the position of Correctional Officer with the Department of Corrections is sustained;

2. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

(Alcorn **continued - Page 17)**

THE STATE PERSONNEL BOARD*

Richard Carpenter, President

Lorrie Ward, Vice President
Alice Stoner, Member
Floss Bos, Member

*Member Alfred Villalobos was not present when this decision was adopted and therefore did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 7-8, 1995.

WALTER VAUGHN
Walter Vaughn, Acting Executive Officer

State Personnel Board